

Glynndeavin von Fox,)	Case No. 2:16-cv-183-RMG-MGB
)	
Plaintiff,)	
)	
v.)	
)	REPORT AND RECOMMENDATION
Keefer and Keefer LLC,)	
)	
Defendant.)	
)	

I. Relevant Law

This Court is required to liberally construe *pro se* documents, *Estelle v. Gamble*, 429 U.S. 97 (1976), holding them to a less stringent standard than those drafted by attorneys, *Hughes v.*

² The Fourth Circuit Court of Appeals recently held that an order denying leave to proceed IFP is the “functional equivalent” of a dismissal, and thus, is outside the scope of a magistrate’s authority. *Hunter v. Roventini*, 617 F. App’x 225, 226 (4th Cir. 2015) (unpublished).

Rowe, 449 U.S. 5 (1980) (per curiam).). The liberal construction afforded *pro se* pleadings means that if the court can reasonably read the pleadings to state a valid claim, it should do so, but a district court may not rewrite a complaint to “conjure up questions never squarely presented” to the court. *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985), *cert. denied*, 475 U.S. 1088 (1986). The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court. *Weller v. Dep’t. of Soc. Servs.*, 901 F.2d 387 (4th Cir. 1990).

B. Applications to Proceed IFP

A plaintiff may pursue a civil action in federal court without prepayment of the filing fee if he submits an affidavit containing a statement of his assets and demonstrates that he cannot afford to pay the required filing fee. 28 U.S.C. § 1915(a)(1). The purpose of the IFP statute is to assure that indigent persons have equal access to the judicial system by allowing them to proceed without having to pay the filing fee. *Flint v. Haynes*, 651 F.2d 970, 973 (4th Cir.1981), *cert. denied*, 454 U.S. 1151 (1982). A plaintiff does not have to prove that he is “absolutely destitute to enjoy the benefit of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

An affidavit to proceed IFP is sufficient if it states facts indicating that the plaintiff cannot afford to pay the filing fee. *Adkins*, 335 U.S. at 339. If a court determines at any time that the allegation of poverty in an IFP application is not true, then the court “shall dismiss the case.” 28 U.S.C. § 1915(e)(2)(A); *and see, e.g., Justice v. Granville Cty. Bd. of Educ.*, 2012 WL 1801949 (E.D.N.C. May 17, 2012) (“dismissal is mandatory if the court concludes that an applicant’s allegation of poverty is untrue”), *affirmed by*, 479 F. App’x 451 (4th Cir. Oct. 1, 2012), *cert. denied*, 133 S.Ct. 1657 (2013); *Berry v. Locke*, 2009 WL 1587315, *5 (E.D.Va. June 5, 2009) (“Even if Berry’s misstatements were made in good faith, her case is subject to dismissal because

her allegation of poverty was untrue”), *appeal dismissed*, 357 F. App’x 513 (4th Cir. 2009). Prior to statutory amendment in 1996, courts had discretion to dismiss a case if it determined that an allegation of poverty was untrue. *See Denton v. Hernandez*, 504 U.S. 25, 27 (1992). The 1996 amendment changed the words “may dismiss” to “shall dismiss.” Mandatory dismissal is now the majority view, and district courts in the Fourth Circuit have adhered to the majority view. *See, e.g., Justice*, 2012 WL 1801949, *6 n.5; *Staten v. Tekelec*, 2011 WL 2358221, *1 (E.D.N.C. June 9, 2011); *Berry*, 2009 WL 1587315, *5.

II. Discussion

A. IFP Not Warranted

In his IFP motion dated January 15, 2016, Plaintiff indicates that he is employed by “Fox Consulting Firm, LLC” and that his “take-home pay or wages” are \$1,200.00 monthly. (DE# 3, ¶ 2). On the printed form, he checks boxes indicating that in the past 12 months, he has received income from (a) business, profession, or other self-employment; (b) rent payments, interest, or dividends; (d) disability or worker’s compensation payments; and (e) gifts or inheritances. (*Id.* ¶ 3). He did not check boxes (c) and (f). Plaintiff explains that the amount he received for (a) was \$50.00; (b) \$1,200.00; (d) \$1,200.00; and (e) \$500.00. (*Id.*). He indicates that he has \$700.00 in his bank account. (*Id.* ¶ 4).³ Plaintiff also indicates he has assets valued at \$140,000.00. (*Id.* ¶ 5).

Plaintiff indicates he has no expenses for “housing, transportation, utilities, or loan payments, or other regular monthly expenses” and no debts or other financial obligations. (*Id.* ¶¶

³ In the many cases filed by Plaintiff in this Court so far in 2016, his different IFP motions indicate bank account balances between \$1,000.00 and \$300.00. The Court may properly take judicial notice of such records. *See Phillips v. Pitt Cty. Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) (courts “may properly take judicial notice of matters of public record.”); *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) (“the most frequent use of judicial notice is in noticing the content of court records”). Additionally, the Court takes judicial notice of the fact that Plaintiff has filed numerous cases in the state courts, which have also denied him permission to proceed IFP and summarily dismissed the cases. *See, e.g.,* Charleston County Circuit Court Case Nos. 2016CP1000297; 2016CP1000320; 2016CP1000321; 2016CP1000322; 2016CP1000352; 2016CP1000515; 2016CP1000516.

6, 8). Plaintiff indicates he has monthly income of \$1,200.00, assets of \$140,000.00, and no debts, which suggests that he has the ability to pay the filing fee in this case (and other cases). *See Justice*, 2012 WL 1801949, *3 (denying IFP status where plaintiff indicated he owned real and personal property with a total value of \$113,500.00 because “the benefit of filing IFP was not intended to allow individuals with significant real and personal property interests to avoid paying a filing fee of \$350.00 in each case”). Based on the record presently before the Court, it appears that Plaintiff can pay the filing fee in this case. (*Id.* at *5, “the court does not agree that plaintiff is actually impoverished,” thus denying IFP status and dismissing four civil lawsuits by the same *pro se* plaintiff). This case should therefore be dismissed. 28 U.S.C. § 1915(e)(2)(A); *see also Thomas v. GMAC*, 288 F.3d 305, 306 (7th Cir.2002) (“Because the allegation of poverty was false, the suit had to be dismissed; the judge had no choice.”); *Justice*, 2012 WL 1801949 at *6 n. 5.⁴ *See, e.g., Cabbil v. United States*, Case No. 1:14-cv-04122-JMC-PJG, 2015 WL 6905072, *1 (summarily dismissing without prejudice; plaintiff was not entitled to proceed IFP); *Willingham v. Cline*, 2013 WL 4774789 (W.D.N.C. Sept. 5, 2013) (same).

B. The Complaint Fails to State a Basis for Subject Matter Jurisdiction, Fails to State a Claim, and is Legally and Factually Frivolous

In addition to not being entitled to proceed IFP, Plaintiff has filed a Complaint that lacks any basis for federal jurisdiction, fails to state a claim against the defendant, and is factually and legally frivolous.

⁴ When denying leave to proceed IFP, the dismissal may be with or without prejudice, in the court’s discretion. *See Staten*, 2011 WL 2358221, *2 (indicating that dismissal with prejudice “for an untrue allegation of poverty ... is appropriate only when the applicant intentionally misrepresented his ... financial condition, acted with bad faith, and/or engaged in manipulative tactics or litigiousness”); *Berry*, 2009 WL 1587315, *5 (same, citing *Thomas*, 288 F.3d at 306-308); *In re Sekendur*, 144 F. App’x at 555 (7th Cir. 2005) (“a court faced with a false affidavit of poverty may dismiss with prejudice in its discretion”). While Plaintiff appears “litigious,” the record does not establish that Plaintiff “intentionally misrepresented his financial condition.” Rather, the facts in his affidavit simply do not indicate that he is entitled to proceed IFP. Hence, dismissal without prejudice is appropriate.

Plaintiff's Complaint is devoid of any facts or allegations that would suggest any basis for federal question jurisdiction or federal diversity jurisdiction. See 28 U.S.C. §§ 1331, 1332. Federal courts are courts of limited jurisdiction, "constrained to exercise only the authority conferred by Article III of the Constitution and affirmatively granted by federal statute." *In re Bulldog Trucking, Inc.*, 147 F.3d 347, 352 (4th Cir. 1998). A federal court is required, *sua sponte*, to determine if a valid basis for its jurisdiction exists, "and to dismiss the action if no such ground appears." *Id.* at 352; *see also Carter v. Ervin*, Case No. 0:14-cv-00865-TLW-PJG, 2014 WL 2468351, *3 (D.S.C.) ("the court possesses the inherent authority to ensure that ... federal jurisdiction exists"), *appeal dismissed*, 585 F.App'x 98 (4th Cir. 2014); *see also* Fed.R.Civ.P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). The Complaint does not mention any pertinent federal law, and the factual allegations of the Complaint reflect that this matter is not one that "aris[es] under the Constitution, laws, or treaties of the United States" pursuant to 28 U.S.C. § 1331. He suggests no basis for diversity jurisdiction.

Plaintiff alleges three "issues" with Keefer and Keefer LLC," but the allegations are completely nonsensical. (DE# 1 at 4-6). For example, he alleges that "the first issue that I have with Sean Keefer Esq. is with the constant intimidation regarding an issue in Japan that he has no record of, and I do not have any record of." (DE# 1 at 4). For his second "issue," he states that "Mr. Keefer is suggesting that as I apply to law schools within the taking of a federal standardized test at Georgetown Law Center, I would have to give up the relationship with my daughter who is qualified under the Indian Child Welfare Act in order to seek admittance in an Ivy League school such as Yale Law School, or Oxford University." (*Id.*). He then states "I am appalled in this aspect towards the understanding that I am someone's slave in the twenty first century regarding freedom of education, if able to gain admittance into that university you should be able to access wit and

knowledge freely.” For his third “issue,” he complains in a few disorganized sentences of Sean Keefer Esq. allegedly “diagnosing me without a psychological license.”

None of these allegations make any sense. The Complaint’s allegations are illogical, incomprehensible, and appear to be the “ramblings of a troubled mind.” *See, e.g., Arledge v. Hall*, 2006 WL 1518915, *1 (S.D.Ga. May 31, 2006) (“these various complaints are utterly fanciful and are clearly the product of a troubled mind that is ... having difficulty grappling with reality”). A district court may not rewrite a complaint to “conjure up questions never squarely presented.” *Beaudett*, 775 F.2d at 1278. The Complaint’s allegations lack any basis in fact or law and are frivolous.

To the extent that Plaintiff may be attempting to assert a state tort claim of legal malpractice, this Court lacks diversity jurisdiction to consider such claim here. The parties all appear to be South Carolina citizens. Under 28 U.S.C. § 1332, diversity of the parties must be complete “such that the state of citizenship of each plaintiff must be different from that of each defendant.” *Home Buyers Warranty Corp. v. Hanna*, 750 F.3d 427, 432-33 (4th Cir.2014) (quoting *Athena Automotive, Inc. v. DiGregorio*, 166 F.3d 288, 290 (4th Cir.1999)).

To the extent Plaintiff may be attempting to sue Sean Keefer Esq. and/or his law firm under 42 U.S.C. § 1983, such claims would be subject to summary dismissal for failure to state a claim because private conduct is not actionable under § 1983. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (citing *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982)). Private activity is generally not “state action.” *DeBauche v. Trani*, 191 F.3d 499, 506-07 (4th Cir. 1999). Sean Keefer Esq. and/or his law firm were not acting “under color of state law.” *See Asbury v. Tartarsky*, Case No. 8:13-cv-3364-RMG, 2015 WL 1120081, *4 n.5 (D.S.C.) (observing that “the under-color-of-state-law element ...reflects judicial recognition of the fact that most rights secured by the

Constitution are protected only against infringement by governments”), *aff’d* by 616 F.App’x 71 (4th Cir. 2015). Summary dismissal of the Complaint is appropriate here.

Finally, the *pro se* Plaintiff seeks relief that is not available or appropriate. (DE# 1 at 8, “What Would You Like the Court to Do”). For example, he indicates he would like “the Court to seek prosecution in the matter with Sean Keefer Esq. and place him under a Federal Bureau of Affairs investigation for the issues regarding the civil rights violations if found worthy of investigation.” (*Id.*). There is no such federal agency. This Court hears cases, it does not “prosecute” parties on behalf of another party, nor does it “open investigations” at federal agencies in the executive branch of the federal government. Plaintiff misconprehends the function of the Court. Plaintiff further indicates that “I would like to be awarded 3.1 Million USD in property in the downtown area of Seattle, WA.” (*Id.*). This Court does not award “real estate” as damages.

III. Recommendation

Accordingly, the Magistrate Judge **RECOMMENDS** that the Plaintiff’s “Motion for Leave to Proceed *in forma pauperis*” (DE# 3) be **denied**, and that this case be **summarily dismissed**, without prejudice, and without issuance and service of process.

February 12, 2016
Charleston, South Carolina



MARY GORDON BAKER
UNITED STATES MAGISTRATE JUDGE

The plaintiff’s attention is directed to the **Important Notice** on following page:

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. **Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections.** “[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must ‘only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.’” *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

**Robin L. Blume, Clerk
United States District Court
Post Office Box 835
Charleston, South Carolina 29402**

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).